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EAST TIMOR
Demand for Justice

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There has been a long-standing pattern of serious human rights violations committed in East Timor since the Indonesian invasion of the territory in 1975. The Indonesian National Army (TNI) and the paramilitary and militia groups that it has armed and trained, have been responsible for numerous acts of violence and intimidation against large sections of the East Timorese population, including extra-judicial executions, "disappearances", and torture. During the popular consultation process in East Timor, militia groups, acting in collusion with the TNI and the police, engaged in a systematic campaign to derail the process and/or intimidate people into voting for the option of special autonomy within Indonesia.

Following the ballot on the future of East Timor on 30 August 1999, the militia groups and the TNI engaged in a systematic wave of violence against the people of East Timor. Throughout East Timor houses and other buildings were destroyed and hundreds of thousands of people fled to the hills in a desperate attempt to escape the violence. Over 200,000 people either fled or were forcibly displaced by the TNI and militias out of East Timor and are now refugees in West Timor and other parts of Indonesia. Although lack of access to these refugees makes verification difficult, Amnesty International has received credible reports that these refugees continue to suffer from violence, intimidation and threats from militia members, including abductions and extrajudicial executions.

These widespread and systematic attacks on the people of East Timor, committed by the Indonesian security forces and the militia groups constitute crimes against humanity and war crimes. The perpetrators of these crimes must be brought to justice. Under international law individuals in the Indonesian government and military chain of command are responsible for crimes against humanity or war crimes committed by their subordinates, if they knew that such abuses were taking place and did not act to prevent them. This principle of criminal responsibility extends to such crimes committed by militias that are not part of official military structures but have been effectively operating under their control. It is vital to the future of East Timor that the individuals responsible for these crimes are held fully to account.

What are crimes against humanity?

Crimes against humanity are inhumane acts aimed at a civilian population which are committed on a systematic basis or on a large scale. These are crimes which are matters of international concern because of their particular severity, which shocks the conscience of humanity.

Crimes against humanity recognized by international law include the practice of systematic or widespread murder, torture (including rape), "disappearances", arbitrary detention, political persecution, deportation and forcible relocation.

These crimes are considered to be crimes against humanity regardless of whether they are committed in times of war or peace. They cannot be excused or permitted by the national law of any state, and all states are under an obligation to prevent them.

What are war crimes?

In general, war crimes can be defined as violations of the laws and customs of war, often known as international humanitarian law, whether these are committed during international or non-international armed conflict.

"Grave breaches" of the 1949 Geneva Conventions constitute war crimes. These include (but are not limited to): wilful killing, torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health; unlawful deportation or confinement of a civilian population; denial of the right to a fair trial; hostage-taking; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In addition, the following grave breaches of Protocol I of the Geneva Conventions are also war crimes: launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage; the deportation or transfer of all or parts of the population of an occupied territory; and unjustifiable delay in the repatriation of prisoners of war or civilians.

Individual criminal responsibility

> *"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."* (Judgment of the International Military Tribunal at Nuremberg, 1946)

Any individual in the governmental hierarchy or military chain of command who intentionally contributes to the commission of a crime against humanity or a war crime can be held criminally responsible for that crime. The normal immunities from prosecution enjoyed by heads of state and other government officials do not apply to crimes against humanity and war crimes.

Military commanders and civilian authorities can be held criminally responsible if they have ordered, instigated, conspired to commit or committed crimes against humanity or war crimes. They can also be held criminally responsible if they have knowingly tolerated such crimes by subordinates or have not taken the necessary measures to prevent or punish them.

Subordinates may not invoke orders from a superior or from a government to avoid criminal responsibility.

Critically important for East Timor, the criminal responsibility of the military commander and civilian superiors extends to crimes committed by armed groups that are not organized into official military structures but operate under their control, whether or not they act under specific and express instructions from the official force.

Universal jurisdiction

Crimes against humanity and war crimes are subject to universal jurisdiction. All states are under an obligation to prosecute and punish crimes against humanity and war crimes and to cooperate in the detection, arrest, extradition and punishment of people responsible for these crimes. Any state can and should bring to trial those accused of such crimes, regardless of where the crimes were committed, the nationality of the person responsible and the nationality of the victim.

Even if a state has failed to incorporate international law on crimes against humanity or war crimes within its domestic criminal law, it is still responsible under international law to investigate allegations of these crimes. Moreover, the length of time that has passed does not diminish this responsibility -- prosecution of crimes against humanity and war crimes cannot be prevented by statutes of limitation. In addition, those responsible for crimes against humanity or war crimes are not eligible for asylum or refuge in another country.

Impunity

Impunity is a failure to bring to justice and punish those responsible for human rights violations. Impunity means a denial of justice for the victims and creates a climate where individuals can continue to commit violations without fear of arrest, prosecution or punishment.

States are duty-bound under international law to take all appropriate measures to respect and protect human rights, and to combat impunity. All states are under an international obligation, when war crimes or crimes against humanity occur:

- to investigate the facts and establish the truth;
- to bring to justice and punish those responsible;
- and to provide reparation to the victims.

Because war crimes and crimes against humanity are so serious, there can be no amnesty for such crimes. The truth of the crimes must be established and made public, the victims must be provided with reparation and the judicial process must be allowed to proceed to produce a clear verdict of guilt or acquittal.

The existence of impunity is an element which helps establish responsibility for crimes against humanity and war crimes. When the highest authorities of the state do not take steps to prevent these crimes and bring the perpetrators to justice and punish them, then those in command are themselves implicated in the crimes.

Time for justice

> *"[I]t is essential that before talking about reconciliation, justice should be done. Justice should be practised first. Those who feel guilt, who killed their brothers and sisters... who burned their houses, they must confess their fault to the East Timor people."*
>
> Bishop Belo, who is considered to be the spiritual leader of the East Timorese people, speaking from the ruins of his residential compound in Dili, *Reuters (12 Oct 1999).*

There can be no impunity for the crimes which have been committed in East Timor. All states and the UN should ensure that those responsible for committing crimes against humanity and war crimes in East Timor are brought to justice.

Investigations are the first step, and the UN Secretary-General, Kofi Annan, is in the process of establishing an International Commission of Inquiry for East Timor. Amnesty International has sent the Secretary-General an open letter with detailed recommendations, calling for the strongest and most effective composition, mandate, powers and methodology for the Commission.[1] The Commission of Inquiry is expected to gather evidence and make recommendations based on its findings to ensure that perpetrators of crimes against humanity and/or war crimes are brought to justice. However, there have already been significant delays in the establishment of the Commission of Inquiry and its experts, at the time of the publication of this report, had yet to visit East Timor. In the meantime, there is a serious risk that critical evidence will be lost or tampered with and that victims and witnesses will face continued initimidation, harassment or attack. The role of a parallel inquiry by the Indonesian National Human Rights Commission (Komnas HAM) remains unclear.

Prosecutions are the second step. There are two ways of prosecuting those responsible: in national courts and through establishing an international tribunal. All states are obliged to prosecute those responsible for crimes against humanity or war crimes by initiating criminal proceedings in their national courts under the principle of universal jurisdiction. In addition, individual states should cooperate with each other in the detection, arrest, extradition and punishment of anyone responsible for such crimes. They should cooperate fully with investigations by the UN and courts in other countries, and should not provide asylum to those suspected of crimes against humanity and war crimes.

Amnesty International believes that the UN should establish an international criminal tribunal on crimes against humanity and war crimes committed in East Timor to ensure that those reponsible for crimes against humanity and war crimes are brought to justice. UN operations in East Timor, including the multinational force (INTERFET), the UN peacekeeping force and the UN Transitional Administration for East Timor (UNTAET), should cooperate fully with the International Commission of Inquiry, national courts operating under the principle of universal jurisdiction, and any future international criminal tribunal. They should ensure that evidence is preserved and that alleged perpetrators of crimes against humanity and war crimes in East Timor are identified, arrested and brought to justice.

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1 See *East Timor: Recommendations to the UN Secretary-General concerning investigations of crimes against humanity and war crimes in East Timor (AI Index: ASA 21/186/99).*

In recent weeks, there have been many statements emphasizing the importance of reconciliation for future social stability in East Timor. Reconciliation between conflicting groups will indeed be an important factor in building a stable future for East Timorese society. However, it must not be used as an excuse to dispense with justice for those who have committed serious human rights violations during the transition process. To build a new social and legal order in East Timor founded on strong human rights principles and the rule of law, it must be recognized that justice and reconciliation are complementary rather than mutually exclusive. Those who are found responsible for crimes against humanity and/or war crimes must be held to account.

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EAST TIMOR
Demand for Justice

"...the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth."

Commission of Experts established to examine grave breaches of International Humanitarian Law committed in the territory of Former Yugoslavia.

Introduction: The "eyes of the world"

As Kofi Annan, Secretary-General of the United Nations (UN) spoke to the press on 10 September 1999, he shared with the international community his horror that "before the eyes of the world, the people of East Timor are being terrorised and massacred because they exercised their rights of self-determination" and noted that the acts carried out could be considered to constitute crimes against humanity, and that those responsible must be called to account.[1]

Extrajudicial executions, rape and sexual violence, "disappearances", forced displacement and other attacks against the civilian population and unarmed personnel of international organizations were, among other violations, all reported in East Timor in the last few months. Men, women and children have been the victims of these violations. These acts have been committed on a large-scale or in a systematic way by militia groups opposed to independence for East Timor, by the Indonesian National Army (*Tentara Nasional Indonesia,* TNI) and, in some cases, by the Indonesian police.

Until the announcement of the results of the ballot on 4 September 1999, human rights violations against the East Timorese people were carried out before the eyes of the world. After this date, potential witnesses, including human rights defenders, journalists and most of the staff of the UN Mission in East Timor (UNAMET) -- which was established to administer the popular consultation -- themselves became targets and were forced from the territory. Following the announcement of the results of the ballot, UNAMET noted the serious and systematic character of the violations of international human rights and humanitarian law which have been carried out in East Timor by the militias in collusion with the TNI.

On 11 September 1999, UNAMET produced a report on mass killings, widespread destruction and forced displacement and concluded that it was "clear that these crimes against

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1 Press conference held by the UN Secretary-General on 10 September 1999 (UN Press Release SG/SM/7124).

humanity are part of a 'scorched earth' policy".[2] The report of a Security Council mission which visited Jakarta and Dili between the 8 to 12 September 1999 stated that "there is strong prima facie evidence of abuses of international humanitarian law committed since the announcement of the ballot result on 4 September."[3] On 17 September 1999, the UN High Commissioner for Human Rights published a report on the human rights situation in East Timor, in which she detailed numerous reports of mass killings, forced displacement and expulsion, "disappearances" and other violations of international human rights and humanitarian law. The High Commissioner characterized these acts as part of a "deliberate, vicious and systematic campaign of gross violations of human rights."[4]

The violations committed in East Timor in recent weeks are neither new nor spontaneous, but are rooted in a long-standing pattern of violations, including extrajudicial executions, "disappearances", arbitrary detention, torture and rape which have been widely documented in East Timor since 1975. Amnesty International has consistently maintained that such violations have been fuelled by the climate of impunity which has prevailed, and which, with few exceptions, has prevented those responsible for human rights violations from being held to account.

The pattern of human rights violations in East Timor and the issue of impunity has also been raised over the years by various of the UN special mechanisms. For example, in a report published following a visit to East Timor in July 1994, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated that there were "patterns of dealing violently with political dissent" and that members of the security forces responsible for human rights violations were "benefiting from impunity".[5] Three years prior to this the Special Rapporteur on torture had informed the Commission on Human Rights of numerous cases of torture and arbitrary detention in East Timor.[6] In 1998, the Working Group on Enforced or Involuntary Disappearances reported a dramatic increase in comparison to previous years of

2 UNAMET, "The destruction of East Timor since 4 September 1999", report on 11 September 1999, para. 8.

3 Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999, S/1999/976, para 21.

4 Report of the High Commissioner for Human Rights on the human rights situation in East Timor, 17 September 1999, para. 47.

5 UN Doc. E/CN.4/1995/61/Add.1, para. 43.

6 UN Doc. E/CN.4/1992/17/Add.1.

allegations of "disappearances" carried out by the Indonesian security forces.[7] The same year, the Special Rapporteur on violence against women also reported that she had received "a large number of submissions regarding sexual violence in East Timor by Indonesian Security Forces" and that impunity for these human rights violations remained intact.[8]

Following the ballot in East Timor on 30 August 1999, this pattern of human rights violations intensified as the militia groups and the TNI engaged in a systematic wave of violence against the people of East Timor. Throughout the territory, houses and other buildings were destroyed and hundreds of thousands of people fled to the hills in a desperate attempt to escape the violence. Over 200,000 people either fled or were forcibly relocated by the TNI and militias out of East Timor and became refugees in West Timor and other parts of Indonesia. Although lack of access to these refugees makes verification difficult, Amnesty International has received credible reports that they are continuing to suffer from violence, intimidation and threats from militia members, including abductions and extrajudicial executions. [9]

These widespread and systematic attacks on the people of East Timor, committed by the Indonesian security forces and the militia groups constitute crimes against humanity and war crimes. The perpetrators of these crimes must be brought to justice. Under international law, individuals in the Indonesian government and military chain of command are responsible for crimes against humanity or war crimes committed by their subordinates, if they knew that such abuses were taking place and did not act to prevent them. This principle of criminal responsibility extends to such crimes committed by militias that are not part of official military structures but have been effectively operating under their control.

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7 UN Doc. E/CN.4/1998/43, paras 218-225.

8 UN Doc. E/CN.4/1998/54, para. 27.

9 Since the beginning of October, a process of repatriation of East Timorese refugees in West Timor and other parts of Indonesia under the auspices of the UNHCR and the International Organization for Migration (IOM) has resulted in the return of several thousand refugees. On 14 October 1999, the Indonesian government and the UNHCR signed a Memorandum of Understanding governing the repatriation process. However, Amnesty International remains concerned that the UNHCR and humanitarian agencies have still not been able to gain full and unimpeded access to many refugees in West Timor, and most camps are still reported to be under the control of the militia and the TNI. The organization is also concerned that the Indonesian authorities have begun a process of registration for transmigration programs aimed at settling some refugees in other parts of Indonesia. Under the prevailing conditions of insecurity, fear and intimidation, it is unlikely that many refugees will be able to make a free and informed decision about participating in either repatriation or transmigration programs. Expressing a wish to return to East Timor is likely to identify an individual as pro-independence, so some may be reluctant to make this choice. There are also concerns about passage to registration centres and points of departure - both in terms of security and accessibility.

It is vital to the future of East Timor that the individuals responsible for these crimes are held fully to account. It is not possible to build a society on the cornerstone of impunity, for it would be one where the rule of law and justice did not exist. As the twentieth century draws to a close, the idea that perpetrators of crimes against humanity and war crimes can remain beyond the reach of justice shocks the conscience of humankind. All states and the UN should ensure that those responsible for committing crimes against humanity and war crimes in East Timor are brought to justice.

The international community took an important step toward this end when, on 27 September 1999, the UN Commission on Human Rights (CHR) adopted resolution S-4 which, among other things, called on the Secretary-General "to establish an international commission of inquiry....in order, in cooperation with the Indonesian National Commission on Human Rights and thematic rapporteurs, to gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote and to provide the Secretary-General with its conclusions with a view to enabling him to make recommendations on future actions..."[10]

It is hoped that the Commission of Inquiry will gather evidence and make recommendations based on its findings to ensure that perpetrators of crimes against humanity and/or war crimes are brought to justice. Amnesty International believes that this should involve the establishment of an international criminal tribunal on crimes against humanity and war crimes in East Timor. However, there have already been significant delays in the formation of the Commission of Inquiry and its experts, at the time of the publication of this report, had yet to visit East Timor. In the meantime, there is a serious risk that critical evidence will be lost or tampered with and that victims and witnesses will face continued initimidation, harassment or attack. The role and purpose of a parallel inquiry by the Indonesian National Human Rights Commission (Komnas HAM) remains unclear.

In recent weeks, there have been many statements emphasizing the importance of reconciliation for future social stability in East Timor. Reconciliation between conflicting groups is indeed an important factor in building a stable future for East Timorese society. However, it must not be used as an excuse to dispense with justice for those who have committed serious human rights violations during the transition process. To build a new social and legal order in East Timor founded on strong human rights principles and the rule of law, it must be recognized that justice and reconciliation are complementary rather than mutually exclusive. Those who are found responsible for crimes against humanity and/or war crimes must be held to account.

[10] Resolution S-4, adopted by the UN Commission on Human Rights at its Special Session on East Timor on 27 September 1999 (UN Doc. E/CN.4/S-4/L.1/Rev.1).

Exemption from punishment may be seen to be an appropriate option for those guilty of lesser offences, but such amnesties should never be offered before the truth of the violation has been brought to light. As section VIII of this report shows, amnesty laws adopted before a judicial process has been completed and truth and reparation ensured are contrary to international human rights law. All perpetrators must be called to account for their actions through a judicial or quasi-judicial process that conforms to international human rights standards of fair trial. Any sanctions or amnesties must be applied in a fair and objective way, based solely on the scale or gravity of the human rights violations that have been committed. Other factors such as race, nationality, geographic or ethnic origin, must not be used to prevent certain perpetratrors of human rights violations from being punished and/or brought to justice.

This paper provides a brief account of the pattern of human rights violations seen in East Timor, before outlining the relevant body of international criminal and human rights law governing crimes against humanity and war crimes. It concludes with a set of recommendations to governments and the United Nations detailing measures which will help to ensure truth, justice and redress for the people of East Timor.

I The militia groups: instruments of terror

East Timorese militia groups opposed to independence for East Timor have been responsible for many of the human rights violations which have taken place in the territory over the past year. While the direct involvement of these militia groups is beyond refute, there is also ample evidence of involvement of the TNI and the police in supporting or assisting these groups, and of their direct participation in unlawful killings, forced relocation and other serious human rights violations.[11]

Far from being a spontaneous reaction by East Timorese supporters of integration to the threat of attack by the pro-independence armed opposition group, Falintil, or other pro-independence supporters, there is strong evidence that the majority of the militia groups which have been active in recent months were established with the encouragement of the TNI and continued to operate with their support. Although no formal structural links exist between these groups and the TNI, the militia groups are known to have received weapons and training from the TNI. Militia members frequently operated out of, and appeared to have free access to, TNI posts, and individuals abducted by militia groups are known, in some cases, to have been held at TNI posts. Joint operations between the TNI and militia groups, and in some cases the

[11] For further information on human rights violations committed in the run-up to, and during the popular consultation process, see Amnesty International, *East Timor: Paramilitary Attacks Jeopardise East Timor's Future (ASA 21/26/99), East Timor: Seize the Moment (ASA 21/49/99),* and *East Timor: Violence Erodes Prospects for Stability (ASA 21/99/99).*

Indonesian police, were not uncommon. In many cases where there was no obvious direct involvement in militia attacks by the TNI or the police, the latter took no action to prevent the attacks or to apprehend those responsible.

The use of civilian militia groups in East Timor by the TNI is not a recent phenomenon, although the majority of those involved in operations against pro-independence supporters in recent months were established in late 1998 and early 1999. According to unverified information received by Amnesty International, local district heads (*bupati*) and other leading figures in East Timor were actively encouraged by members of the Indonesian military authorities to set up militia groups in their districts. Among the new groups set up since late 1998 were Aitarak (Dili), Besi Merah Putih (Manatuto/Liquica), Laksaur (Suai), Mahidi (Ainaro), Naga Merah (Ermera), BPI 59/75 Junior (Viqueque) and Sakunar (Oecuesse). Older groups which are known to have worked alongside the TNI in previous years have also been operative in recent months. These include Tim Saka and Tim Sera in Bacau, Makikit in Viqueque district, Tim Alfa in Los Palos.

Throughout the popular consultation process, the Indonesian authorities made repeated assurances to the UN and to the international community that they would take measures to guarantee the security of the East Timorese people in accordance with their obligations under the 5 May 1999 Agreements.[12] By the day of the ballot - 30 August 1999 - there were some 8,000 Indonesian police and 15,000 TNI members stationed in East Timor. However, despite their massive presence, the Indonesian security forces proved unable or unwilling to fulfil the preconditions necessary for the consultation process to be implemented. These conditions had been identified by the UN Secretary General in his memo of 22 May 1999 and included bringing armed civilian groups under strict control, the prompt arrest and prosecution of those who incite or threaten to use violence and ensuring freedom of association and expression for all political groups.

In June 1999, there was an apparent attempt by the authorities to formalise the status of some militia groups when it was announced that members from BMP and Aitarak would be recruited into a voluntary civilian defence force called PAM Swakarsa. According to the Indonesian authorities, PAM Swakarsa was to be an auxiliary security force for the ballot. After strong protests from the international community the initiative was halted.

12 Signed by the governments of Portugal and Indonesia under the auspices of the UN, these agreements consisted of a main agreement which set out the terms under which the popular consultation would be conducted and the political consequences of the vote; an agreement on modalities which provided a schedule, criteria on eligibility of voters and details on operational phases of the popular consultation process; and an agreement regarding security, in which certain of the Indonesian security forces would have responsibility for security.

The police, who under the Agreements and under Indonesia's own Code of Criminal Procedure, had sole responsibility for maintaining law and order, consistently failed to provide protection to those targeted for attack. To Amnesty International's knowledge, only seven members of militia groups were arrested and brought to trial. They were tried under Emergency Law No. 12/1951 (illegal possession of firearms) and Article 170 of the Criminal Code (uniting to commit violence against persons or property) for an attack on a humanitarian convoy in Liquica on 4 July 1999, and sentenced to four months' imprisonment. Another five people were due to be brought to trial for an attack on the UNAMET compound in Maliana which took place on 29 June 1999. Amnesty International has been unable to confirm whether or not the trial has taken place.

In many instances, the police are known to have been present while attacks took place but took no action, and in some cases members of the police are known to have directly participated in militia operations. For example, on 27 August 1999, a number of militia members were led by a police escort into the village of Memo following a pro-integration rally in the nearby town of Maliana, Bobonaro district. On arrival, the militia groups began to throw rocks at the villagers. At some point during the confrontation, police and militia members are believed to have opened fire. At least one person, Raul dos Santos, was shot, possibly by the police who deny they were responsible for his death. The attackers were repelled by the villagers who had armed themselves with makeshift weapons, but returned later in the day to launch a second attack. At least one person, was killed during this second attack.

In an earlier incident, on 11 August 1999, one student and one other person were killed in Viqueque district during a militia attack at which Brimob (mobile police brigade) officers were present. According to an eyewitness, between 20-30 militia members walked round the town firing shots and throwing rocks. UNAMET Military Liaison Officers asked Brimob, who had just arrived in the town, to protect the UNAMET office, but the latter reportedly refused on the grounds that they would come under fire from the militia. Their only action was to march in formation behind the militias.

Two members of Brimob are known to have stood by during an attack which left at least two local UNAMET staff dead in Baboe Leten village, Ermera district on 30 August 1999. Around ten militia members accompanied by a member of the TNI arrived at Baboe Leten in the late afternoon as UNAMET staff were preparing to escort the ballot boxes to the town of Atsabe. The UNAMET local staff were beaten, kicked and stamped on during the attack. One is believed to have died on the spot and another was stabbed and died later. The fate of a third UNAMET employee is still unconfirmed.

While serious human rights violations took place in the months preceding the popular consultation process and during the process itself, the level of violations reached a new level of intensity in the days and weeks after 4 September 1999, the day on which the overwhelming vote rejecting the autonomy package was announced (78.5 per cent). Within three days of the

announcement, UNAMET was forced to evacuate its staff from all East Timorese districts to Dili because of threats to their security. In Liquica, for example, the UNAMET compound came under attack from a group of around 20 militia members on 4 September. The 20 Brimob officers who were guarding the compound made no attempt to intervene to stop the attack. The UN staff in the compound fled from the back of the building and drove to the local police station. On their way they came under sustained fire, apparently from the militia. During the attack, one UN civilian police officer was shot in the stomach and had to be airlifted to Darwin, Australia for emergency treatment. International observers and journalists were similarly forced to leave districts of East Timor outside Dili, and eventually the territory itself.

Within Dili, threats and attacks by militia groups grew increasingly intense in the aftermath of the ballot. At first, these threats were aimed at specific targets, notably locations where displaced East Timorese people were known to be sheltering and hotels where foreign journalists were staying. For example, on 5 September 1999, militia members attacked and set fire to the Makhota Hotel and the neighbouring Dili Catholic Diocese building. The police and TNI reportedly made little attempt to intervene. The next day, members of the TNI forced foreign journalists to leave the Tourismo Hotel in Dili. The journalists were reportedly told to go to the UNAMET compound, the Australian consulate or Comoro Airport. On the same day, armed militia members forced staff from the International Committee of the Red Cross (ICRC) and around 2,000 displaced East Timorese people who had been sheltering there to leave the compound. The international staff were handed over to the Indonesian authorities at a local police station. The fate of the local staff and the displaced people remains unclear, although many are believed to have been forcibly relocated to West Timor. Also on 6 September, members of the TNI and militia launched a joint attack on the house of Bishop Belo in Dili. Thousands of displaced people were sheltering at the Bishop's compound when the attack took place. Following the attack, large numbers of people were reportedly marched at gunpoint by the TNI and forced onto trucks bound for West Timor. Bishop Belo himself managed to secretly escape and board a UN flight to Darwin, Australia. He has now returned to Dili.

These specific attacks were accompanied by a more general wave of intimidation against Dili residents. People were forced to leave their homes and find sanctuary elsewhere, often with the church or international agencies. In some cases, militia came to places of sanctuary and threatened people again, telling them to go to the Regional Police Command (POLDA) for their own security.

Throughout this period, police failed in their duty to protect people and often colluded in attacks. Several thousand people sought shelter at POLDA during this time, but police gave militia members free access to the compound. The authorities reinforced people's sense of insecurity by telling them that their safety could not be guaranteed if they remained. With no other choice, many people opted to leave East Timor by the military transport, ships and chartered aircrafts provided by the authorities. There are some reports of people being forcibly transported against their will.

This pattern of intimidation, forcible relocation and destruction appears to have been echoed in other parts of East Timor. Reports from Aileu district, for example, indicate a well-organized plan to remove local residents from one area even before the ballot result was announced. On 31 August 1999, Brimob personnel arrived in four villages in the Liquidoe Sub-district in Aileu District, and began firing into the air. Militiamen then arrived, ordering people to leave and burning houses down. They gathered people together and forced the people to state whether or not they had voted for independence. Those who had were told that they would have to stay in East Timor and that they would "die". In the town of Aileu itself, an observer reported that local TNI officials ordered people to leave their homes, register their names and state which way they had voted in the ballot. They were then told to gather their belongings and move towards the police headquarters in Aileu. According to the observer, one group of people claimed they had been told they would be going to the towns of Atambua or Kupang in West Timor; if they refused to go they would be considered to have voted for independence and would die. The population began to be moved from Aileu in trucks on 3 September.

According to reports by the multinational force in East Timor (INTERFET) following reconnaissance flights over East Timor in early October 1999, the majority of towns and villages in East Timor have been almost entirely emptied of their populations and thousands of homes and other buildings have been destroyed. Over 200,000 East Timorese people are known to have either fled or been forcibly relocated to the bordering province of West Timor. Others have fled to other parts of Indonesia including Bali, Flores and Java, while hundreds of thousands are thought to have fled to the hills in East Timor.

Access to refugees in West Timor by human rights monitors, humanitarian organizations and others has been extremely restricted, even after the Indonesian authorities signed a Memorandum of Understanding on repatriation with the UNHCR which, among other things, allows the UNHCR to establish an operational presence in areas where East Timorese refugees are living to ensure that the agreement is being honoured.[13] However, according to credible information received by Amnesty International, fleeing from East Timor has not brought refugees any relief from fear or intimidation. Most of the West Timor camps in which many of the refugees are located are known to be controlled by the militia groups and the TNI and there are credible reports of unlawful killings and abductions as well as threats and intimidation both inside and outside the camps. Distribution of humanitarian aid has been hampered by militia activity. Elsewhere in Indonesia, there have been reports of East Timorese people being subjected to harassment and intimidation.[14]

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13 See supra, note 9.

14 For further information on the human rights situation for East Timorese refugees in Indonesia, see Amnesty International, *East Timor: The Terror Continues (ASA 21/163/99)* and *East Timor: Refugees at Risk (ASA 21/180/99).*

These widespread and systematic violations of human rights and international humanitarian law carried out in East Timor by militia groups, acting with and supported by the TNI and the police, constitute crimes against humanity and war crimes under international law.

II Crimes committed

A Crimes against humanity

Crimes against humanity are crimes under both international customary law[15] and conventional law (law arising from treaty obligations). These crimes are recognized for their particular severity and for shocking the conscience of humankind.[16] They are subject to particular norms which have been developed under international law over several decades.

Crimes against humanity recognized by international law include genocide, the practice of systematic or widespread murder, torture (including rape), forced disappearances, deportation and forcible transfers, arbitrary detention, political persecutions and other inhumane acts. Each of these crimes against humanity has been recognized as a crime under international law in international conventions or other international instruments, most recently in the treaty establishing the International Criminal Court (ICC).[17]

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15 Article VI (c) of the International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950). The principles articulated in the Nuremberg Charter and Judgment were recognized as international law principles by the UN General Assembly in 1946, UN GA Res. 95 (I).

16 Crimes against humanity are "serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity". *(Prosecutor v. Erdemoviÿ, Sentencing Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, 29 November 1996).*

17 See, for example, The Declaration of France, Great Britain and Russia on 24 May 1915; Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the 1919 Preliminary Peace Conference; Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg; Allied Control Council Law No. 10 (1946); Article 6 (c) of the Charter of the International Military Tribunal for the Far East (1946); Article 2 (10) of the Draft Code of Offences against the Peace and Security

Genocide is a crime under customary international law as well as under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948.[18] Forced disappearance is considered to be a crime against humanity when it is committed as part of a widespread or systematic practice.[19]

Torture - whether as a single case or one which is part of a widespread or systematic practice of crimes against humanity - is a crime under customary and conventional law. Recalling the principles of the Nuremberg judgement and the Universal Declaration of Human Rights, the UN Committee against Torture has said that there is "a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture".[20]

These crimes are considered to be crimes against humanity regardless of whether they are committed in times of war or peace.[21]

Crimes against humanity and the norms which regulate them form part of *jus cogens* (fundamental norms). Thus, they constitute peremptory norms of general international law which, as recognized in Article 53 of the Vienna Convention of the Law of Treaties (1969), cannot be modified or revoked by treaty or national law. Article 53 states that "a peremptory

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of Mankind (1954); Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993); Article 3 of the International Criminal Tribunal for Rwanda (1994); Article 18 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996); and Article 7 of the Statute of the International Criminal Court (1998).

18 UN GA Res. 96 (I) (1946). See also *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. Rep. 15.

19 OAS General Assembly Resolutions AG/Res.666 (XIII-083) and AG/Res.742 (XVI-0/84); Resolution 828 of 1984 of the Parliamentary Assembly of the Council of Europe; UN Declaration on the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly in Resolution 47/133 of 18 December 1992, Preamble, para. 4; Preamble of the Inter-American Convention on the Forced Disappearance of Persons (forced disappearance); and Article 3 of the UN Draft Convention on the Protection of All Persons from Enforced Disappearance.

20 UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2.

21 Rome Statute of the ICC, Art. 7; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. I (b).

norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Similarly, the prohibition of torture and genocide "is itself a norm of *jus cogens* or a 'peremptory norm of general international law'". The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has noted that "the prohibition of torture is a peremptory norm or *jus cogens*".[22]

Jus cogens refers to the legal status of certain crimes under international law, and the obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens.* Indeed, the International Court of Justice recognized the prohibition in international law of acts, such as those which have occurred in East Timor, as an obligation *erga omnes*, i.e., a duty that *all* states have a legal interest in fulfilling:

> *"[A]n essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising vis-à-vis another State [...] By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have an interest of a legal nature in their protection; they are obligations erga omnes.*
>
> *"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character."* [23]

B War crimes

In general, war crimes can be defined as violations of the laws and customs of war, which implicate individual criminal responsibility. War crimes are crimes under both customary international law and conventional international law (i.e. treaty law).

Article 6(b) of the Charter of the International Military Tribunal at Nuremberg , defined war crimes as :

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22 ICTY, Trial Chamber, *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, para. 144.

23 International Court of Justice, *Barcelona Traction, Light and Power Company Ltd.*, Judgment, in ICJ, 1972 Report, paras 33-34.

"violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

This definition was reaffirmed by the UN International Law Commission in its Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Article VI (b)). The principles articulated in the Nuremberg Charter and Judgment were recognized as principles of international law by the UN General Assembly in 1946.[24]

War crimes include "grave breaches" of the Geneva Conventions. According to the Fourth Geneva Convention, war crimes include: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a civilian population, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights to a fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Under Additional Protocol I, the following crimes, among others, constitute grave breaches and thus, war crimes: launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

Although Indonesia has not ratified this Protocol, the grave breaches provisions are generally regarded as reflecting customary international law.[25] The conflict in East Timor is considered by the international community to be an international armed conflict, given East

24 UN GA Res. 95 (I) (1946).

25 Final report of the Commission of Experts established pursuant to Resolution 780 of the Security Council (1992), UN Doc. S/1994/674, para. 45.

Timor's status as a non-self-governing territory and the illegal nature of Indonesia's annexation of it in 1975. Even if the conflict were considered a non-international armed conflict, the prohibitions of common Article 3 of the Geneva Conventions, which are war crimes, would apply.[26] Grave breaches of the Geneva Conventions and of Protocol I, as well as violations of common Article 3, all generate individual criminal responsibility.[27]

III Rules on individual criminal responsibility for crimes against humanity and war crimes

The International Military Tribunal at Nuremberg declared in its Judgment that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[28]

Since the International Military Tribunal at Nuremberg, it has been a principle of international law that the individual has international rights which transcend national boundaries, and that individuals responsible for international crimes such as crimes against humanity, genocide, torture, and war crimes should be punished. This principle of individual responsibility and of punishment for crimes under international law has been reaffirmed by numerous international instruments, including the Convention for the Prevention and Punishment of the Crime of Genocide of 1948 (Articles III and IV); the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture); the Statute of the ICTY (Articles 7.1 and 23.1); the Statute of the International Criminal Tribunal for Rwanda (ICTR) (article 6.1 and 22.1); and the Rome Statute of the ICC (Article 25).

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26 Common Article 3 prohibits the following acts against civilians and combatants who have laid down their arms or been rendered *hors de combat*:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

27 These prohibitions fall within the jurisdiction of the International Criminal Court under Article 8 of the Rome Statute.

28 *Nazi Conspiracy and Aggression: Opinion and Judgment* (Nuremberg Judgment), U.S Gov. Printing Office 1947, p. 41.

Individual criminal responsibility applies without exception to any individual in the governmental hierarchy or military chain of command who contributes to the commission of a crime of this nature.[29]

A Absence of immunity for heads of state or responsible government officials

The normal immunities enjoyed by heads of state and other government officials do not apply in cases of crimes against humanity and war crimes. This principle of international law was articulated as early as the First World War, when attempts were made to try the Kaiser for violations of international law.

Article 7 of the Nuremberg Charter expressly provides that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

The Nuremberg Tribunal concluded that state immunities do not apply to crimes under international law:

> *"It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."*[30]

As stated above, the principles articulated in the Nuremberg Charter and Judgment, including the principle that heads of state may be held criminally responsible for crimes against humanity, have long since been recognized as part of general international law. The fundamental rule of international law that heads of state and public officials do not enjoy immunity for crimes against humanity and war crimes has been consistently reaffirmed for more than half a century by the international community and is part of customary international law. The UN International Law Commission recently stated:

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29 International Law Commission, Report of the UN International Law Commission on its 48th session, 6 May to 26 July 1996, document A/51/10, supplement 10, p. 34.

30 Nuremberg Judgment, supra note 15, pp. 41-42.

"As further recognized by the Nürnberg Tribunal in its judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence." [31]

The principle of criminal responsibility of heads of state has been also included in numerous treaties and other international instruments since Nuremberg.[32] International jurisprudence has reiterated this principle. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) recently emphasized with respect to a charge of torture that the rule of criminal responsibility of heads of state under international law in its Statute and in the Statute of the International Criminal Tribunal was a rule of customary international law:

"Those who engage in torture are personally accountable at the criminal level for such acts. . . Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7 (2) of the Statute and article 6 (2) of the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda . . . are indisputably declaratory of customary international law." [33]

The Prosecutor of the ICTY recently stated, "Legally, it would be wrong to believe that heads of state who came to power after the break-up of Yugoslavia are exonerated from responsibility for acts committed during the war." In addition, she noted that "the tribunal's

31 Report of the International Law Commission, supra note 29.

32 Article 6 of the Charter of the International Military Tribunal for the Far East (1946); Article 4 (a) of the Allied Control Council Law No. 10; Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950), Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954); Article III of the Convention on the Suppression and Punishment of the Crime of *Apartheid*; Article 7 (2) of the 1993 Statute of the ICTY; Article 6 (2) of the 1994 Statute of the ICTR; Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance; Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 and Article 27 of the Rome Statute for the ICC.

33 *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, para. 140.

statutes are very explicit, . . . they do not exonerate a person acting as head of state from responsibility towards the tribunal."[34]

The UN International Law Commission has explained why the rule that heads of state and public officials are not immune when they commit crimes under international law is an essential part of the international legal system:

> *". . . crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Draft Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."* [35]

B Responsibility of commanders and other superiors

Military commanders and those who effectively act as military commanders are not only criminally responsible for ordering, instigating, conspiring to commit, or committing crimes against humanity and/or war crimes, but also for tolerating such crimes or not taking the necessary measures to prevent their commission, to bring them to a halt or repress them, when they knew or had reason to know that the subordinate was about to commit such crimes or had done so.

It is a long standing principle of international law, recognised by the Hague Convention of 18 October 1907 (IV) respecting the Laws and Customs of War on Land, and subsequently reiterated in various international instruments such as the Additional Protocol I to the 1949

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34 "Top officials in ex-Yugoslavia not immune from prosecution: UN", Zagreb, AFP, 11 January 1999.

35 1996 Report of the International Law Commission, supra note 26.

Geneva Conventions, that military leaders are responsible for the conduct of the armed forces under their command and for other people over whom they have authority, and, therefore, that they are responsible for the illegal conduct of their subordinates if this contributes directly or indirectly to the commission of a crime.

The Commission of Experts on grave breaches of international humanitarian law committed in the territory of the Former Yugoslavia affirmed that, in the light of international law: "A person who gives the order to commit a war crime or a crime against humanity is equally guilty of the offence as the person actually committing it. This principle, already expressed in the Geneva Conventions of 1949, applies to both military superiors, whether of regular or irregular armed forces, and to civilian authorities."[36]

A Trial Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that: "[t]he criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional international law."[37]

This principle has been equally recognised in various judicial decisions since the Second World War, for example: in the cases of *Yamashita*, *Von Leeb - "German High Command Trial"* and the *List - (Hostages trial)*[38], as well as by the jurisprudence of the ICTY.

In the *List* case - (*Hostages trial*), the United States Military Tribunal stated: "The duty and responsibility for maintaining peace and order, and the prevention of crime rest upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence."[39]

The UN International Law Commission has affirmed that "the military commander also contributes to the commission of a crime by his subordinate by not preventing or repressing illegal conduct."[40] It has also affirmed that the concept of "superior" is not only applied to the "immediate officer in command of the subordinate, but also to his other superiors in the military chain of command or in the governmental hierarchy." In this way, "military commanders or other civil authorities who find themselves in a similar position of command and who exercise

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36 UN Doc. S/1994/674, para. 55.

37 Trial Chamber, Judgement on 16 November 1998, Case No. IT-96-21-T, *Prosecutor v. Z. Delalic and others,* para 734.

38 See Law reports of Trial of War Criminals , UN Commission on Crimes of War.

39 Decision of 19 February 1948, Annual Digest of Public International Law Cases, 1948, p. 652.

40 International Law Commission report, 1996, UN Doc. Supp.(No. 10) A/51/10, p. 38.

a similar level of authority with respect to their subordinates" are criminally responsible if they fail in their duty to prevent or repress crimes against humanity and war crimes committed by their subordinates.[41]

This principle of criminal responsibility of the commander or military superior for not fulfilling the duty to prevent and/or punish the illegal conduct of a subordinate is explicitly recognized, as far as crimes against humanity or war crimes are concerned, in numerous international instruments.[42] Article 28 (1) of the Statute of the International Criminal Court (Rome Statute) makes explicit the full scope of this principle:

> *" In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*
> *1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*
> > *(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
> > *(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."*

The same principle applies to civilian superiors, as recognised in Article 28 (2) of the Rome Statute:

> *"2. With respect to superior and subordinate relationships not described in paragraph (1), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*

41 Ibid.

42 Article 86 (2) Additional Protocol I of the Geneva Conventions; Article 7.2 of the Statute of the ICTY; Article 6.3 of the Statute of the ICTR; Articles 2 (2,c) and 6 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996); Article 28 of the Statute of the ICC; Principle 19 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Article 5 of the UN Code of Conduct for Law Enforcement Officials; and, Article 9.3 of the UN Draft Convention on the Protection of All Persons from Enforced Disappearance.

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Criminal responsibility of the military commander and civilian superiors extends to crimes committed by paramilitary groups and/or other armed groups not organized into official military structures, operating under their control, whether or not they act under specific and express instructions from the official force.[43]

International law provides that, in certain circumstances, the crime committed by a single private individual - when he or she has acted as a *de facto* organ of the state - may generate individual criminal responsibility for the military commanders and those who effectively act as military commanders. The Appeals Chamber of the ICTY stated:

"Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs. In these cases, it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility" [44]

C Due obedience and crimes against humanity

It is a principle of international law that neither orders from a superior or from a government nor the principle of due obedience can be invoked to escape criminal responsibility. Any subordinate who participates in the commission of crimes against humanity, in compliance with superior orders, is also criminally responsible for these crimes.

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43 ICTY, *Prosecutor v. Tadic*, judgment of 15 July 1999.

44 *Prosecutor v. Tadic*, judgment of 15 July 1999, para 144.

The principle of criminal responsibility of the subordinate is explicitly recognised in international instruments defining crimes under international law[45] as well as in several human rights instruments.[46] It follows that any person receiving an order to commit crimes against humanity and war crimes has not merely the right, but the duty, to disobey.

IV Crimes against humanity and war crimes are subject to universal jurisdiction

According to the principle of universal jurisdiction, any state can and should judge those suspected of crimes against humanity or war crimes regardless of the place where the crimes were committed, the nationality of the person responsible and the nationality of the victim.

This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity and war crimes regardless of where they had been committed. As previously stated, the principles articulated in the Nuremberg Charter and Judgment were recognized as principles of international law by the UN General Assembly in 1946. Similarly, genocide and torture are crimes under international law which are subject to universal jurisdiction.

The legal interest *erga omnes* permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity. Crimes against humanity, like the crime of piracy, are considered to be crimes which any state may punish. The right and duty to ensure the international rule of law is not that of any single country, but any country, in the interest of all, can exercise jurisdiction and punish such crimes.[47]

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45 Article 8 of the Charter of the International Military Tribunal at Nuremberg (1945); Article 6 of the Charter of the International Military Tribunal for the Far East (1946);Article II(1)(c) and II(4)(b) of the Allied Control Council Law No. 10 (1946); Article 7(4) of the Statute of the ICTY; Article 6(4) of the Statute of the ICTR; Article 5 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996); and Article 33 of the Rome Statute of the ICC.

46 Article 2 (3) of the UN Convention against Torture; Principle 19 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Article 5 of the UN Code of Conduct for Law Enforcement Officials; and, Article 6 (1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

47 *"le droit ou le devoir d'assurer l'ordre public n'appartient a aucun pays [...] tout pays, dans l'intérêt de tous, peut saisir et punir"*, Cour Permanente de Justice Internationale, Affaire du Lotus (France/Turquie), arrêt du 7 septembre 1927, Serie A, N° 10, p. 70, opinion individuelle du Juge Moore.

The Geneva Conventions have special provisions on universal jurisdiction. Article 146 of the Fourth Geneva Convention states:

> *"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."* [48]

In addition, all states are under an obligation to prosecute and punish crimes against humanity or war crimes and to cooperate in the detection, arrest, extradition and punishment of persons implicated in these crimes. In 1973, the UN General Assembly articulated the UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, which sets out a comprehensive and detailed list of obligations on all states to bring to justice those responsible for war crimes and crimes against humanity (see appendix).[49]

The Rome Statute of the International Criminal Court states in paragraphs 4 to 6 of the Preamble "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"; the Statute determined "to put an end to impunity for the perpetrators of these crimes" and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

V Duty to bring to justice those responsible for crimes against humanity and war crimes regardless of whether they are crimes under national law

The failure of a state to incorporate international law on crimes against humanity or war crimes within their domestic criminal law does not excuse it from its international responsibility to pursue judicial investigations. The International Covenant on Civil and Political Rights (ICCPR) (Article 15(2)) and the European Convention on Human Rights (Article 7(2)) clarify that a person accused of committing crimes under international law can be prosecuted according

48 This obligation applies with equal force to grave breaches of Protocol I

49 UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the UN General Assembly in Resolution 3074 (XXVIII) on 3 December 1973.

to the principles established and recognized by international law. Recalling the principles of the Nuremberg Judgment and the Universal Declaration of Human Rights, the UN Committee against Torture considered that, where torture is concerned, this obligation exists regardless of whether a state has ratified the UN Convention against Torture, as there is "a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture."[50]

The principles established by the Nuremberg Tribunal are also reflected in the UN International Law Commission's reaffirmation that "international law may impose duties on individuals directly without any interposition of internal law."[51]

VI The inapplicability of statutes of limitation

Crimes against humanity and war crimes are unaffected by statutes of limitation. Thus, the passing of time does not diminish the responsibility of the state to indict, try and sentence those responsible for crimes against humanity or war crimes.[52] In its decision of 26 January 1984 in the case of *Touvier*, the High Court (Cour de Cassation) of France reiterated that the principle of non-applicability of statutory limitations to crimes against humanity is recognised by the community of nations.

VII The prohibition of asylum

Those responsible for crimes against humanity or war crimes cannot benefit from asylum or refuge in another country. This principle is established in Principle 7 of the UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity; Article 1(f) of the Convention relating to the Status of Refugees; and Article 1(2) of the UN Declaration on Territorial Asylum.

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50 UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2.

51 Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10, p. 16.

52 This principle is reiterated in several treaties: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UN GA Res. 2391 (XXII) of 1968; the Council of Europe's treaty: Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, E.T.S. No. 82, adopted on 25 January 1974, and Article 29 of the Statute of the International Criminal Court.

VIII Impunity and amnesty laws

"[I]t is essential that before talking about reconciliation, justice should be done. Justice should be practised first. Those who feel guilt, who killed their brothers and sisters... who burned their houses, they must confess their fault to the East Timor people."

Bishop Belo, who is considered to be the spiritual leader of the East Timorese people, speaking from the ruins of his residential compound in Dili, *Reuters (12 Oct 1999).*

All states not only have the international obligation not to commit crimes against humanity and war crimes, but when such crimes do occur, to investigate the facts, establish the truth, bring to justice and punish those responsible in a way commensurate with their crimes and provide reparation to the victims. This is a guiding principle of international law which has been reiterated by various international bodies. For example, and as mentioned earlier, the Committee against Torture considers there to be a "a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture."[53] This principle has also been reiterated by the Inter-American Court on Human Rights: "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[54] The UN Commission on Human Rights has repeatedly reminded states of this obligation in various resolutions it has adopted on the question of forced disappearances.[55]

53 UN Committee against Torture, Decision relative to communications 1/1988, 2/1988 and 3/1988, of 23 November 1989, para. 7(2).

54 Inter-American Court on Human Rights, Sentence of 29 July 1988 in the case of *Velázquez Rodríguez*, in Series C: Resolutions y Sentences, N° 4, para. 174.

55 UN Commission on Human Rights, Resolutions 1994/39, paragraph 15 and 1995/38, paragraph 13.

The international obligation to bring to justice and punish those responsible for human rights violations is not only a general principle of international law but is also enshrined in several human rights treaties.[56]

The Human Rights Committee considers "that the State party [of the ICCPR] is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified."[57]

Impunity is a phenomenon which violates international human rights law. In adopting the Vienna Declaration and Programme of Action at the World Conference on Human Rights in June 1993, states reaffirmed the need to "abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."[58]

To leave grave human rights violations unpunished is not only a violation of the state's international obligations to investigate the facts, bring to justice and punish the perpetrators. Impunity, as the UN Human Rights Committee has asserted, is also a violation of the right to effective remedy guaranteed under article 2(3) of the ICCPR.[59] In order to protect this right and so the right to justice, states are under an obligation to both avoid impunity and take measures against it.[60]

In many cases, the measures taken by states to ensure impunity for human rights violations also violate the right to the truth of victims, their families and society in general, as

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56 For example: articles 4 and 5 of the Convention against Torture impose an obligation on the state to punish those responsible for this crime. This obligation does not only appear in treaties; see also article 4 of the Declaration on the Protection of All Persons from Enforced Disappearances and Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

57 Views of 13 November 1995, Communication No. 563/1993 (Colombia), UN Doc. CCPR/C/55/D/563/1993, para. 8(6).

58 UN Doc. A/CONF.157/23, para. 60.

59 UN Human Rights Committee, Observations and conclusions - Lesotho, CCPR/C/79/add.106, April 1999, par. 17.

60 Inter-American Court on Human Rights, Sentence of 22 January 1999, reparations in the case of Blake Series C: Resolutions and Sentences, N°48, paragraph 64.

well as the right to reparation of the victims and their families. Thus, the expert appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the question of impunity for perpetrators of human rights violations defined impunity as "a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations."[61]

The international obligations of states to investigate violations, bring to justice and punish the perpetrators, provide reparation to the victims and establish the truth are complementary in nature and cannot be interpreted as alternative or substitutable obligations. This means that states are not in a position to choose which one of these obligations it will fulfill.[62] Even if they can be fulfilled separately from each other, the state is still obliged to comply with each and every one. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions explained this in the following way:

> *"Governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations [..] the recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."*[63]

For this reason, the Human Rights Committee considered that it was imperative to adopt strict measures to confront the problem of impunity, ensuring that allegations of human rights

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61 E/CN.4/Sub.2/1997/20 Rev.1, doc. cit., principle 18.

62 "no es posible que el Estado elija cuál de estas obligaciones habrá de cumplir", Méndez, Juan, "Derecho a la Verdad frente a las graves violaciones a los derechos humanos", in Abregú, Martín et al. eds. La aplicación de los tratados sobre derechos humanos por tribunales locales, (Buenos Aires: CELS, 1997), p. 526.

63 UN Special Rapporteur on summary, extrajudicial or arbitrary detentions, Report to the Commission on Human Rights, E/CN.4/1994/7, paras. 688 and 711.

violations are immediately and thoroughly investigated, that the perpetrators are brought to justice and punished in an appropriate way and that victims are provided with adequate compensation.[64]

There are several ways in which perpetrators of human rights violations may enjoy impunity. For example, the authorities may fail to investigate human rights violations. Sometimes their investigations may not be prompt or thorough or in accordance with international standards on the matter. Those responsible may obtain impunity when the state fails to bring perpetrators of human rights violations before the law courts, or when it does so only in certain cases. Impunity exists when the authorities fail to investigate all of the human rights violations committed in a particular case, or fail to try those responsible for the whole range of crimes committed. Impunity also occurs when those responsible for a violation are not punished in a way that is commensurate with the seriousness of the crimes or when the authorities fail to ensure that such punishment is carried out.

Impunity is also an issue when the state denies victims the right to justice by not ensuring that independent and impartial trials are carried out. For example, the state may grant amnesty to those responsible for human rights violations before they have been brought to justice and their criminal responsibility has been established by a court.

Amnesty laws or similar measures which are adopted before the truth of the crimes has been established and made public and before the victims have been provided with reparation and the judicial process has been completed with a clear verdict of guilt or acquittal, are contrary to international law. The international community cannot accept that human rights violations remain unpunished and must oppose impunity for crimes which are as serious as crimes against humanity and war crimes. The UN General Assembly has clearly stated that there can be no amnesties for crimes against humanity and war crimes : "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."[65]

The Secretary-General of the United Nations recently reiterated this principle when he stated that the amnesty law in Sierra Leone "shall not apply to international crimes of genocide,

64 Human Rights Committee, Observations and Recommendations to the State of Brazil, CCPR/C/79/Add. 66, paragraph 20.

65 UN Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. 3074 (XXVIII) (1973), para. 8.

crimes against humanity, war crimes and other serious violations of international humanitarian law."[66] In the same report he further explained that:

> *"[a]s in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future ICC. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement, explicitly stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.*[67]

Moreover, the Human Rights Committee has repeatedly asserted that any kind of amnesty law which denies the victims their rights to effective remedy, truth and reparation and/or which attempts to exonerate the state of its obligation to prosecute, try and punish those responsible for human rights violations, is incompatible with the international obligations of states under international human rights law.[68]

The UN Declaration on the Protection of All Persons from Enforced Disappearances specifically deals with this point in article 18 (1):

> *" Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."*

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66 Seventh Report of the Secretary-General on the United Nations - Observer Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7.

67 Seventh Report of the Secretary General on the United Nations - Observer Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 54.

68 UN Human Rights Committee, Views of 19 July 1994, Case Hugo Rodriguez, Communication 322/1988, UN Doc. CCPR/C/51/D/322/1988; Preliminary observations of the Human Rights Committee - Peru, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para. 20; Observations of the Human Rights Committee - France, UN Doc. CCPR/C/79/Add.80, para. 13; Observations of the Human Rights Committee - Uruguay, UN Doc. CCPR/C/79/Add.19, para. 7, Observations of the Human Rights Committee - Argentina, UN Doc. CCPR/C/79/Add.46, para.10; Human Rights Committee - El Salvador, UN Doc. CCPR/C/79/Add.34, paras 7 and 12; Chile, CCPR/C/79/Add. 104, para 7; Haiti, A/50/40, paras. 224-241; Lebanon CCPR/C/79/add.78 and General Comment No. 20, para. 15.

The existence of impunity as far as crimes against humanity and war crimes are concerned, can also be an element which reveals responsibility for or proof of these crimes. When crimes against humanity and war crimes go unchecked, and when the highest authorities of the state do not take measures to investigate these crimes, bring the perpetrators to justice and punish them, then impunity also becomes an element which implicates the criminal responsibility of those in command. This was the opinion of the Commission of Experts on the grave breaches of international humanitarian law committed in the territory of the Former Yugoslavia when they stated that:

> *"[t]he consistent failure to prevent the commission of such crimes and the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established."*[69]

IX Time for justice: the responsibilities of the international community

Individual states

All states are obliged to prosecute those responsible for crimes against humanity or war crimes by initiating criminal proceedings in their national courts under the principle of universal jurisdiction. In addition, all states should:

- cooperate in the detection, arrest, extradition and punishment of persons responsible for crimes against humanity and war crimes;
- cooperate fully with the UN International Commission of Inquiry, any other UN investigatory mechanism;
- cooperate fully, under the principle of universal jurisdiction, with judicial proceedings carried out by other national courts of other countries, including by providing all available information and intelligence on human rights violations and abuses and on those allegedly responsible;
- not provide asylum to those responsible for crimes against humanity and war crimes and proceed to either try them or to extradite them to another country wishing to try them, while ensuring that they are not be sent to countries where they may be at risk of serious human rights violations.

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[69] UN Doc. S/1994/674, para. 313.

The United Nations

The UN should take the necessary steps to bring those responsible for these crimes to justice. In light of the scale of violations documented by Amnesty International and other organizations, including the UN, Amnesty International believes that the UN should establish an international criminal tribunal on crimes against humanity and war crimes committed in East Timor. The establishment of an International Commission of Inquiry under the auspices of the UN Secretary-General is an important first step in this process. The Commission should:

- gather evidence of crimes against humanity or war crimes in East Timor and make recommendations based on its findings to ensure that perpetrators are brought to justice, that the truth of the crimes is established and that the victims, individually as well as collectively, are provided with full reparation;
- be staffed by persons of high moral standing, recognized for their knowledge and expertise on human rights, international humanitarian law and criminal law;
- be assisted in the field by experts in forensic medicine, investigations into human rights violations and breaches of international humanitarian law, criminal investigation, law and the investigation and prosecution of gender-based violence;
- carry out investigations in a thorough, effective and independent manner and which is perceived to be so by the East Timorese people and the international community. It should be guided in its investigations by the rules of international law regarding crimes against humanity and war crimes;
- be allowed to carry out investigative missions throughout the entire territory of East Timor and have access to all places without restriction, to travel to other countries to collect evidence and testimonies, and to request and receive from all states and entities of the UN any information and materials that it believes to be necessary and relevant for its investigations.

The Multinational Force in East Timor (INTERFET) and any further peacekeeping force in East Timor should:

- be provided with all necessary resources to provide protection to members of the International Commission of Inquiry, experts assisting them, persons accompanying them on mission, victims, complainants, witnesses, and those collaborating with the investigation and their families; provide protection and logistical support to the investigative teams of the Commission in the field;
- cooperate in the detection, identification, arrest, detention and transfer of the alleged perpetrators of crimes against humanity and war crimes and fully cooperate with requests from national courts of foreign states acting under the principle of universal

jurisdiction in order to try crimes against humanity and war crimes, particularly in the arrest and transfer of persons requested by these courts.

- secure evidence of war crimes and crimes against humanity, and protect and restrict access to sites of massacres and zones or areas where there are indications of the existence of clandestine cemeteries.

The UN Transitional Administration for East Timor (UNTAET) should:

- cooperate fully with the International Commission of Inquiry;
- ensure that the activities of INTERFET and the UN peacekeeping force regarding the arrest, continued detention and transfer of alleged perpetrators of crimes against humanity and war crimes are carried out in accordance with international human rights and criminal justice standards.

Appendix: UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity[70]

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

2. Every State has the right to try its own nationals for war crimes against humanity.

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

7. In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment-of persons guilty of war crimes and crimes against humanity.

9. In co-operating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of

[70] Supra note 49

the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.